Supreme Court, U.S.
FILED

941088 DEC 15 1994

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

DR. MICHAEL G. FORRESTER; MICHAELENE ANN JENKINS; DONNA E. NIEHOUSE; DENA A. NIEHOUSE; NANCY H. SCOFIELD; HAROLD E. SCOFIELD,
Petitioners,

vs.

CITY OF SAN DIEGO;
DONALD FASHING;
D. HANNAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LLOYD EDWARD TOOKS
Attorney at Law
P.O. Box 126237
San Diego, California 92112
(619) 696-7339
Counsel Of Record for Petitioners

4 pp

QUESTIONS PRESENTED

1. Does the policy of the San Diego Police Department that (i) denies arresting officers the discretion to make on-the-scene judgments concerning the kind of force that is reasonable and necessary to remove passive, non-violent demonstrators from demonstration scenes, and (ii) requires officers to intentionally hurt such demonstrators, with the probability of causing serious injury (hereinafter "pain compliance"), as the sole means of removing them, violate the Fourth Amendment as interpreted in *Graham v. Connor*?

2. Is pain compliance excessive force, as a matter of law, when (i) it is used against passive, non-violent demonstrators, and (ii) empirical evidence proves that dragging or carrying was the reasonable and appropriate force under the circumstances?

3. In light of *Graham v. Connor* did the Ninth Circuit Court of Appeals err in upholding the jury verdict in this case -- that the use of pain compliance was not excessive force -- when the record contains no testimony or other evidence that supports the jury verdict, and when the only evidence in the record from the perspective of a reasonable officer at the scene proves that dragging or carrying was the reasonable and appropriate force under the circumstances facing the officers at the scene?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 3

ARGUMENT 9

A. Reasons Relied On For Allowance Of The Writ . . . 9

B. The Pain Compliance Mandate Violates The Fourth Amendment 9

C. The Use Of Pain Compliance Against Petitioners Constituted Excessive Force As A Matter Of Law . . 11

D. The Court Of Appeals Erred In Upholding A Jury Verdict That Was Contrary To The Only Evidence Offered At Trial From The Perspective Of A Reasonable Officer At The Scene 13

E. Conclusion 14

TABLE OF AUTHORITIES

Pages

CASES

Graham v. Connor (1989) 109 S.Ct. 1865 . . . . . 9, 10, 13

STATUTES

Fourth Amendment to the Constitution 2, 8

28 USC Section 1254(1) 1

28 USC Section 1331 8

42 USC Section 1983 . . . . . 2, 8

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is reported at 25 F.3d 804, and is set forth in the Appendix of this certiorari petition for the convenience of the Court. Also set forth in the Appendix is the Court of Appeals' Order denying petitioners' petition for rehearing and rejecting the suggestion for rehearing en banc.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit, accompanied by a dissent by one of the Circuit Judges, was filed on June 1, 1994. Petitioners filed a timely petition for rehearing with a suggestion for rehearing en banc. The petition was denied, and the en banc suggestion rejected, by the Court of Appeals in an Order filed September 22, 1994. This petition for certiorari was filed within ninety (90) days after the filing of that Order. The jurisdiction of this Court is invoked pursuant to 28 USC section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 USC section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Prior to April 8, 1989, the Chief of the San Diego, California, Police Department established a mandate concerning the force that would be used to remove arrestees from the premises of anti-abortion demonstrations that were expected to take place in San Diego in the near future. Under the mandate (hereinafter referred to as "the pain compliance mandate") any anti-abortion demonstrator who was arrested and who did not voluntarily walk away from the premises of the demonstration when asked to do so by the police (hereinafter referred to as a "recalcitrant arrestee") would be forcibly removed by use of Orcutt Police Nunchakus ("OPNs") and/or some other "pain compliance" method. The OPNs consists of two elongated pieces of wood attached together at one end by a tough cord. Pain is administered by wrapping the cord around a person's wrist or arm and using the wood as handles to twist the cord and tighten it around the limb.

Another method by which the officers were to apply pain compliance was by severely bending and/or twisting an arrestee's hand, wrist or arm.

The pain compliance mandate expressly prohibited officers from dragging or carrying recalcitrant arrestees, even if the officers believed that dragging or carrying was the reasonable and appropriate method of force under the circumstances. The San Diego Police Chief knew that, in the absence of the pain compliance mandate, officers would drag and carry recalcitrant

arrestees rather than use pain compliance. Moreover, the mandate was not intended for general application. It was established, and intended, for use only against anti-abortion demonstrators, and was applicable to all such demonstrators; whether they weighed 80 pounds or 280 pounds, whether male or female, and no matter what their age.

It was understood and expected, at the time the pain compliance mandate was established, that (i) the exclusive use of pain compliance against recalcitrant arrestees would probably lead to more arrestees being injured, and (ii) the injuries to arrestees would include strained ligaments and tendons, and broken bones.

At a pre-dawn meeting on April 8, 1989, a group of approximately 25 San Diego police officers (hereinafter referred to as "the pain compliance unit") was advised of the pain compliance mandate. Later that day a group of persons that included Petitioners demonstrated their opposition to abortion by standing or sitting down outside a medical building in San Diego. However, prior to the time that the pain compliance unit arrived at the scene of the demonstration other San Diego police officers arrived at the scene. Each of those officers, based on his/her assessment of the circumstances at the scene, began removing recalcitrant arrestees from the premises by dragging or carrying them away. None of those officers, or the demonstrators they removed, were injured. Before any of those officers had the

opportunity to drag or carry Petitioners away, however, the pain compliance unit arrived at the scene.

When the pain compliance unit arrived the other police officers ceased making arrests and removing recalcitrant arrestees, and the officers of the pain compliance unit assumed those tasks.

The parties stipulated at the trial that Petitioners were arrested and removed from the premises of the demonstration by members of the pain compliance unit, and that:

(a) Each Petitioner was sitting down when he/she was arrested;

(b) Each Petitioner was arrested for a misdemeanor offense of trespass and/or failure to disperse;

(c) Each Petitioner was subjected to pain compliance so severe that it resulted in each Petitioner suffering serious injury, including Petitioner Forrester suffering a broken wrist;

(d) Petitioners did not attempt to run away, or otherwise flee, prior to, during, or after their arrests;

(e) Petitioners did not verbally threaten the police officers prior to, during, or after their arrests;

(f) Petitioners did not strike, or otherwise physically attack or threaten, the police officers prior to, during, or after their arrests.

The parties also stipulated at the trial that the arrest and seizure of Petitioner Donna Niehouse took place in the following manner:

(i) Mrs. Niehouse was sitting on the ground, outside the medical building, with her legs crossed;

(ii) Respondent Fasching approached Mrs. Niehouse and advised her that she would be arrested for trespassing if she did not leave the premises;

(iii) Mrs. Niehouse did not respond to Respondent Fasching;

(iv) Respondent Fasching advised Mrs. Niehouse that she was under arrest, and immediately two other San Diego police officers placed OPNs around each of Mrs. Niehouse's wrists;

(v) Respondent Fasching said to Mrs. Niehouse, "Stand up and walk and there will be no pain at all";

(vi) When Mrs. Niehouse did not move Respondent Fasching ordered the police officers holding the OPNs around her wrists to "put some pain on her";

(vii) As the police officers began to twist the OPNs around Mrs. Niehouse's wrists, she moved from a sitting position to a position on her knees and began screaming;

(viii) The police officers continued to twist the OPNs around Mrs. Niehouse's wrists, and she continued to scream on her knees, and Respondent Fasching continued to say "Stand up and walk";

(ix) Respondent Fasching then said "Arrest team come on in", and, while the two officers continued to twist the OPNs

around Mrs. Niehouse's wrists, another police officer grabbed her, by her hair and the back of her pants, and pulled her to her feet;

(x) Mrs. Niehouse then walked from the premises in the company of the two police officers who continued to hold the OPNs around her wrists.

The application of pain compliance caused Mrs. Niehouse to suffer bruises to both arms, and pinched nerves in her left hand that left her partially incapacitated for approximately four months.

The application of pain compliance to Petitioner Michael Forrester broke his wrist, and left him partially incapacitated for approximately three months.

The application of pain compliance to the other Petitioners resulted in various injuries that left each Petitioner partially incapacitated for periods from several weeks to three months.

The members of the pain compliance unit who arrested and seized Petitioners testified at the trial. When asked why he/she used pain compliance, rather than dragging or carrying, the sole response of each officer was that he/she had been ordered to do so under the pain compliance mandate. None of the officers testified that any conduct by Petitioners, or other circumstance facing them at the scene, justified or warranted the use of pain compliance rather than dragging or carrying.

Petitioners were demonstrating at the same demonstration, and in the same passive and non-violent manner, as those demonstrators who were dragged and carried away. The only

reason why Petitioners were subjected to pain compliance, and serious injury, was because they were arrested and seized by officers who were operating under the pain compliance mandate, rather than officers who were not.

The pain compliance mandate remains in existence and continues to be applied by the San Diego Police Department exclusively against anti-abortion demonstrators.

Petitioners brought this federal court action against Respondents under 42 USC section 1983, alleging that (1) the pain compliance, and serious injury, they suffered constituted excessive force and violated the Fourth Amendment to the United States Constitution, and (2) the pain compliance mandate is unconstitutional. The basis for federal jurisdiction in the district court was 28 USC Section 1331.

In ruling on cross-motions for partial summary judgment the magistrate judge who presided over the trial and pretrial proceedings held that the pain compliance mandate is constitutional. The excessive force issue was then tried before a jury, and the verdict of the jury was that Petitioners had not suffered excessive force. A judgment, based on the verdict and the magistrate judge's pretrial ruling, was entered by the district court in favor of Respondents.

Petitioners pursued a timely appeal to the Ninth Circuit Court of Appeals, and the Court of Appeals, with one judge dissenting, affirmed the district court judgment.

ARGUMENT

A. Reasons Relied On For Allowance Of The Writ

The primary reason why certiorari should be granted in this case is because the Ninth Circuit Court of Appeals has approved both a forcible seizure mandate, and an application of that mandate, that dramatically and patently conflict with the Fourth Amendment's objective reasonableness standard and this Court's decision in *Graham v. Connor*.

A second reason why Petitioners' Writ should be granted is to enable this Court to address an important federal question; i.e., the constitutionality of law enforcement officers seizing passive, non-violent persons by intentionally hurting and injuring them.

B. The Pain Compliance Mandate Violates The Fourth Amendment

In *Graham v. Connor* (1989) 109 S.Ct. 1865, this Court held:

> ". . . **all** claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a substantive due process' approach" (109 S.Ct. at 1871).

Under the Fourth Amendment standard, "[t]he 'reasonableness' of a particular use of force must be judged **from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight**" (109 S.Ct. at 1872)(emphasis added). This Court further defined "reasonableness" by stating,

> ". . . the 'reasonableness' inquiry in an excessive force case is an **objective one**: the question is whether the officers' actions are 'objectively reasonable' **in light of the facts and circumstances confronting them**, without regard to their underlying intent or motivation" (Id)(emphasis added).

Clearly, as described in *Graham*, the Fourth Amendment reasonableness standard does not permit the San Diego Police Chief to predetermine and mandate the use of pain compliance, and prohibit his officers from using the kind of force that, "judged from the perspective of a reasonable officer on the scene", is appropriate and necessary. Such a predetermined and mandated use of force is the antithesis of Fourth Amendment objective reasonableness.

Law enforcement's use of excessive force is prohibited by the Constitution because free citizens have a right to be seized in a manner commensurate with their resistance. The kind and level of force used must be determined by the kind and level of resistance; not predetermined and mandated. Free citizens are

entitled to be seized by trained law enforcement officers who possess appropriate discretion -- not by pre-programmed "robot cops".

C. The Use Of Pain Compliance Against Petitioners Constituted Excessive Force As A Matter Of Law

As noted by Judge Kleinfeld in his dissent in this case, "[t]he use of [pain compliance] to hurt these non-violent, passive demonstrators was unconstitutional as a matter of law, because it was both ineffective and unnecessarily brutal" (25 F.3d at 809).

Pain compliance was ineffective as applied to Petitioners because the infliction of pain alone did not accomplish the purpose for which it was intended; to wit, removing Petitioners from the demonstration scene. Additional methods of force were necessary. As noted above in the description of the manner in which Mrs. Niehouse was removed, pain compliance was not effective in causing her to walk away from the scene. It merely caused her to kneel on the ground and scream in pain. She had to be grabbed by her hair, and back of her pants, and pulled to her feet.

Also, as Judge Kleinfeld noted in his dissent, another Petitioner, Ms Jenkins, was actually prevented from getting up and leaving the scene because the pain compliance hurt her so much. As she testified, "I was trying to get up, but it hurt so much I couldn't".

Not only was pain compliance ineffective, but the officers who used it knew, beforehand, that it would be ineffective. At the

pre-dawn meeting, referred to above, Sergeant Fasching told the members of the pain compliance unit that "most of the time [the demonstrators subjected to pain compliance will] sit there and scream because it does in fact hurt but they won't move, so you'll have to follow up with some kind of control hold".

The use of pain compliance against Petitioners was also unnecessarily brutal. Again, Petitioners were not subjected to pain compliance because of the nature of their resistance or any other circumstance at the scene. They were subjected to pain compliance because of the Police Chief's predetermined mandate; and the mandate was based on the Chief's erroneous assumption that the demonstrators would actively resist officers' efforts to lift, drag or carry them.

The Chief testified at the trial that he anticipated that the demonstrators would ball themselves up, or chain themselves together or to structures, or otherwise make it difficult for the officers to lift, drag or carry them. However, no such active resistance was actually engaged in by the demonstrators. The demonstrators, including Petitioners, were passive, non-violent, and, when seized by the officers, merely allowed their bodies to go limp; the kind of conduct that reasonable officers at the scene determined should be responded to by lifting, dragging and carrying.

D. The Court Of Appeals Erred In Upholding A Jury Verdict That Was Contrary To The Only Evidence Offered At Trial From The Perspective Of A Reasonable Officer At The Scene

As noted above, this Court in *Graham v. Connor* held that the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight" (109 S.Ct. at 1872). The question in an excessive force case is an objective one; i.e., "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them" (Id).

The *Graham* opinion further states that proper application of the Fourth Amendment reasonableness standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" (Id).

In the present case it is undisputed that, relative to the "reasonableness" issue, the **only evidence** offered at trial "from the perspective of a reasonable officer on the scene" was the conduct of the officers who were not members of the pain compliance unit, and who removed demonstrators by dragging and carrying them. Only those officers used the force determined to be reasonable based on the facts and circumstances confronting them at the scene. The jury in this case, then, was bound by the determination

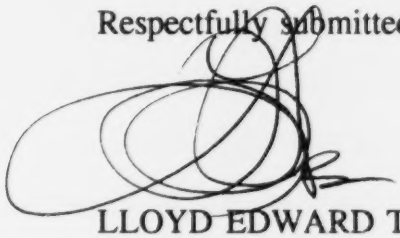
of those officers that dragging and carrying was the reasonable and appropriate force under the circumstances.

Since the only relevant evidence established "dragging and carrying" as the reasonable and appropriate force in this case, the use of pain compliance against Petitioners had to be excessive force; and the only way the jurors could have decided otherwise was by relying on their own personal opinions instead of relying on the relevant evidence "from the perspective of [] reasonable officer[s] on the scene". In other words, the jury based its decision on prohibited "20/20 vision of hindsight".

E. Conclusion

For the reasons set forth in this petition, we respectfully submit that a writ of certiorari should be issued to review the opinion of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,



LLOYD EDWARD TOOKS
Attorney for Petitioners

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL G. FORRESTER; MICHAELENE ANN JENKINS; DONNA E. NIEHOUSE; DENA A. NIEHOUSE; NANCY H. SCOFIELD; HAROLD E. SCOFIELD,
Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO, a municipal corporation; DONALD FASHING; D. HANNAN,
Defendants-Appellees.

No. 92-55137

D.C. No. CV-89-1051-E

OPINION

Appeal from the United States District Court
for the Southern District of California
William B. Enright, District Judge, Presiding

Argued and Submitted
July 14, 1993—Pasadena, California

Filed June 1, 1994

Before: Floyd R. Gibson,* Cynthia Holcomb Hall, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Hall; Dissent by Judge Kleinfeld

*The Honorable Floyd R. Gibson, Senior Circuit Judge for the United States Court of Appeals, Eighth Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/Arrest/Police

The court of appeals affirmed a district court judgment. The court held that sufficient evidence supported a jury verdict that police officers did not use excessive force when they used "pain compliance techniques" in executing the arrests of demonstrators.

After police in appellee City of San Diego became aware that protestors planned to stage anti-abortion demonstrations in the City, the City's police chief adopted a policy for dispersing and arresting the demonstrators who trespassed on and blocked entrances to private medical clinics. The policy provided for verbal warnings to the protestors, and the use of "pain compliance techniques" involving the application of pain as necessary to coerce movement. The "pain compliance" policy provided for the police to use "Orcutt Police Nonchakus (OPNs)," sticks of wood connected by a cord which are used to grip demonstrators' wrists, or direct physical contact. The policy prohibited officers from using the "drag and carry" method on arrestees, even though officers generally have discretion to use such a method.

After appellants, several anti-abortion demonstrators, blocked entrances to medical buildings, City police officers implemented pain compliance techniques. Officers forcibly moved the arrestees by tightening OPNs around their wrists until they walked. The demonstrators sued the City, claiming that the police violated the Fourth Amendment by using excessive force in executing the arrests, and that the City's pain compliance policy was unconstitutional. A magistrate judge found the policy to be constitutional, and granted summary judgment in favor of the City. The judge, however, allowed the case to proceed to the jury in order to determine whether any particular uses of force were unconstitutional.

After viewing a videotape of the arrests, the jury concluded that none involved excessive force, and returned a verdict for the City. The district court entered judgment for the City.

The demonstrators appealed, contending that the evidence did not support the jury's verdict, and the City's pain compliance policy was unconstitutional.

[1] Ample evidence supported the jury's conclusion that the officers acted reasonably in using pain compliance techniques to arrest the demonstrators. In addition to hearing the testimony of numerous officers and demonstrators, the jury watched the entire videotape of the arrests.

[2] The evidence satisfied the "reasonableness" inquiry applicable to claims that officers have used excessive force in the course of an arrest. The police did not threaten or use deadly force, and did not deliver physical blows or cuts; rather, the force consisted only of physical pressure administered on the demonstrators' limbs. [3] In addition, the City had a legitimate interest in quickly dispersing and removing lawbreakers with the least risk of injury to others. [4] The officers were not required to use the least intrusive degree of force possible. [5] The videotape indicated that the officers used minimal and controlled force in a manner designed to limit injuries to all involved. Thus, substantial evidence supported the jury verdict.

[6] Whether the City's pain compliance policy was itself unconstitutional did not need to be decided. [7] By finding that the arrests did not involve the use of unreasonable force, the jury found that neither the officers nor, implicitly, the policy caused any deprivation of constitutional rights. This rendered moot the question of whether the City's policy authorized the use of constitutionally excessive force.

Circuit Judge Kleinfeld dissented, stating that the use of nonchakus to hurt the non-violent, passive demonstrators was

unconstitutional as a matter of law, because it was both ineffective and unnecessarily brutal.

COUNSEL

Lloyd Edward Tooks, San Diego, California, for the plaintiffs-appellants.

Francis M. Devaney, Deputy City Attorney, San Diego, California, for the defendants-appellees.

OPINION

HALL, Circuit Judge:

Anti-abortion demonstrators who were arrested for trespass and unlawful assembly appeal (1) the district court judgment that the City of San Diego's policy regarding pain compliance arrest techniques was constitutional and (2) the jury verdict that San Diego's police officers did not use excessive force in executing their arrests. Because sufficient evidence supported the jury verdict, we affirm without deciding whether the city's policy authorized unreasonable uses of force.

I.

In March 1989, San Diego police became aware that Operation Rescue planned to stage several anti-abortion demonstrations in the city.[1] Cognizant of the protest tactics used by

[1]Members of Operation Rescue stage "rescue" demonstrations at abortion clinics nationwide. "The purpose of these 'rescue' demonstrations is to disrupt operations at the target clinic and . . . ultimately to cause the clinic to cease operations." *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 780 (O'Connor, J., dissenting). To achieve this goal, the demonstrators "trespass on clinic property and physically block access to the clinic, preventing patients, as well as physicians and medical staff, from entering the clinic to render or receive medical or counseling services." *Id.*

Operation Rescue members in other demonstrations, San Diego Police Chief Burgreen met with his staff to formulate a plan of action. After considering several options, Burgreen adopted a policy for dispersing and arresting demonstrators who trespassed on and blocked entrances to private medical clinics.

The policy provided for the police first to give the protesters an opportunity to avoid arrest by leaving the premises after a verbal warning. The police were then to arrest those who refused to leave and give them another opportunity to move voluntarily. Finally, the police were to remove the remaining demonstrators with "pain compliance techniques" involving the application of pain as necessary to coerce movement. The "pain compliance" policy provided for the police to use either "Orcutt Police Nonchakus" (OPNs) (two sticks of wood connected at one end by a cord, used to grip a demonstrator's wrist) or direct physical contact (firm grip, wrist- and arm-twisting, and pressure point holds).

Although San Diego police officers generally have discretion either to use pain compliance or to drag and carry arrestees, Burgreen's policy absolutely prohibited officers from using the drag and carry method. Burgreen changed the existing rule in anticipation of the Operation Rescue protests for two reasons. First, he wanted to prevent the back injuries that multiple dragging and carrying causes to police and arrestees. And, second, he wanted to maximize police control over the large crowds he anticipated.

In each of the three demonstrations at issue, protesters converged upon a medical building, blocking entrances, filling stairwells and corridors, and preventing employees and patients from entering. When police or property owners attempted to remove them, the demonstrators "passively" resisted by remaining seated, refusing to move, and refusing to bear weight. At the first demonstration, the initial police officers on the scene dragged and carried arrestees. However,

after the arrival of the "pain compliance unit," and in each subsequent demonstration, the officers implemented Burgreen's policy and used only pain compliance techniques.

For each arrest, the officers warned the demonstrators that they would be subject to pain compliance measures if they did not move, that such measures would hurt, and that they could reduce the pain by standing up, eliminating the tension on their wrists and arms. The officers then forcibly moved the arrestees by tightening OPNs around their wrists until they stood up and walked. All arrestees complained of varying degrees of injury to their hands and arms, including bruises, a pinched nerve, and one broken wrist.

Several subsequently filed suit, claiming that the police violated the Fourth Amendment by using excessive force in executing the arrests and that San Diego's pain compliance policy was unconstitutional. A magistrate judge found the policy to be constitutional and granted summary judgment in favor of the city. The judge, however, allowed the case to proceed to the jury in order to determine whether any particular uses of force were unconstitutional. After viewing a videotape of the arrests, the jury concluded that none involved excessive force and returned a verdict for the city. After denying a JNOV motion, the court entered judgment on the verdict for the city and the demonstrators filed a timely appeal.

II.

The demonstrators first contend that evidence does not support the jury's verdict. Keeping in mind that "[w]hether the amount of force used was reasonable is usually a question of fact to be determined by the jury," *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2995 (1992), we review the jury's verdict to determine "whether it is supported by substantial evidence, that is, such relevant evidence as a reasonable mind might accept as adequate to sup-

port a conclusion," *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (internal quotation omitted).

A.

"*[A]ll* claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). *E.g., Ward v. City of San Jose*, 967 F.2d 280, 284 (9th Cir. 1991).

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. . . . [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them.

Graham, 490 U.S. at 396-97 (internal quotations omitted). *E.g., Barlow*, 943 F.2d at 1135. "The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of *all* the relevant circumstances." *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir.) (en banc), *cert. denied*, 112 S. Ct. 582 (1991).[2]

[2]In *Graham*, the Supreme Court indicated that relevant factors in the Fourth Amendment reasonableness inquiry "*includ[e]* the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396 (emphasis

B.

[1] We think ample evidence supports the jury's conclusion that the officers acted reasonably in using pain compliance techniques to arrest the demonstrators. In addition to hearing the testimony of numerous officers and demonstrators, the jury watched the entire videotape of the arrests (and watched excerpts on repeated occasions). As the district court noted, the videotape created an extensive evidentiary record: "Thanks to videotaped records of the actual events, plus the testimony of witnesses on both sides, the jury had more than a sufficient amount of evidence presented to them from which they could formulate their verdicts. . . . The extensive use of video scenes of exactly what took place removed much argument and interpretation of the facts themselves."[3]

---

added). The Court did not, however, limit the inquiry to just these factors. Rather, the Court instructed that the jury should consider "whether the totality of the circumstances justifies a particular sort of seizure." *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

The dissent ignores this fact, attempting instead to turn the *Graham* analysis into a rigid three-part inquiry. This we cannot do. As the differences between *Graham* and this case aptly illustrate, "the facts and circumstances" of every excessive force case will vary widely. Constraining a jury's analysis to the dissent's limited inquiry would nullify *Graham*'s test of "objective reasonableness" and would, therefore, contravene both the letter and spirit of the Court's pronouncement in that case.

[3]The demonstrators contend that the only relevant evidence of reasonableness is the conduct of officers initially responding to the first protest. They note that the jury must analyze the issue "from the perspective of a reasonable officer on the scene," *Graham*, 490 U.S. at 396, and argue that actions of the subsequently arriving officers who implemented the pain compliance policy are not relevant because those officers could not have used the drag and carry method even if they thought it best to do so.

We disagree. Although Burgreen was not "on the scene" when he decided to implement the pain compliance policy, he based his decision on the anticipated circumstances of the demonstrations, which corresponded to the actual circumstances the officers encountered. On the videotape, the jury was able to observe the presence of factors indicating that

[2] The evidence satisfies the *Graham* inquiry of reasonableness. First, the nature and quality of the intrusion upon the arrestees' personal security was less significant than most claims of force. The police did not threaten or use deadly force and did not deliver physical blows or cuts. Rather, the force consisted only of physical pressure administered on the demonstrators' limbs in increasing degrees, resulting in pain. *Compare Eberle*, 901 F.2d at 820 (reasonable as a matter of law to use a painful "finger control hold" to remove belligerent spectator from arena) *with Hammer*, 932 F.2d at 846 (unreasonable to forcibly extract blood against the will of arrestee who indicates a willingness to undergo alternative form of alcohol testing).

[3] Second, the city clearly had a legitimate interest in quickly dispersing and removing lawbreakers with the least risk of injury to police and others. The arrestees were part of a group of more than 100 protesters operating in an organized and concerted effort to invade private property, obstruct business, and hinder law enforcement. Although many of these crimes were misdemeanors, the city's interest in preventing their widespread occurrence was significant: "[T]he wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, persistent, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens." *Bray*, 113 S. Ct. at 769 (Kennedy, J., concurring). The city had a substantial interest in preventing the organized lawlessness conducted by the plain-

---

pain compliance techniques were in fact reasonable, including the demonstrators' conduct, the officers' conduct, the size of the crowd, the presence of other protesters, the manner in which force was applied, and the consequences of that force.

If this evidence were not sufficient, police departments could never develop general policies for handling arrests. Neither *Graham* nor the Fourth Amendment compels us to reach such an illogical conclusion.

tiffs in this case, and the police were also justifiably concerned about the risk of injury to the medical staff, patients of the clinic, and other protesters. *Id.* at 780 (O'Connor, J., dissenting).

[4] Despite these governmental interests, the demonstrators argue that dragging and carrying was a *more* reasonable means of accomplishing the city's goals and therefore contend that any other method was excessive. Police officers, however, are not required to use the least intrusive degree of force possible. Rather, as stated above, the inquiry is whether the force that was used to effect a particular seizure was reasonable, viewing the facts from the perspective of a reasonable officer on the scene. *See Graham*, 490 U.S. at 396. Whether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue. *See Hammer*, 932 F.2d at 846.[4]

[5] Each officer had the discretion to use force or not, and if deciding to do so, how much force to apply. The videotape indicates that, after the demonstrators ignored pleas to desist and warnings regarding pain compliance techniques, the officers used minimal and controlled force in a manner designed to limit injuries to all involved. Substantial evidence supported the jury verdict.[5]

---

[4]The dissent reasons that, because "the nonchakus inflicted great pain and subsequent disability without directly accomplishing th[e] purpose [of forcing demonstrators to walk], their use could not be reasonable." [Dissent at 5726]. This after-the-fact analysis violates the fundamental precept of *Graham*; namely, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

[5]Although not explicitly stated, the dissent's analysis requires the conclusion that no reasonable juror could have found the city's use of force in this case to be reasonable. *See, e.g., Eberle*, 901 F.2d at 818. In so concluding, the dissent compares the city's "brutal" use of force with a hypothetical torture-by-lighted-cigarette method. This comparison displays a fundamental misunderstanding of the pain compliance techniques at issue.

III.

[6] The demonstrators contend that, even if the police did not violate the Fourth Amendment by using pain compliance techniques to execute their arrests, the city's pain compliance policy is itself unconstitutional. We need not decide this issue.

[7] By finding that the arrests did not involve the use of unreasonable force, the jury found that neither the officers nor, implicitly, the policy, *caused* any deprivation of constitutional rights. This renders moot the question of whether the city's policy *authorized* the use of constitutionally excessive force:

> [None] of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers if in fact the jury has concluded that the officer inflicted no constitutional

---

Unlike the use of a lighted cigarette, which would create immediate and searing pain, the discomfort produced by the OPNs was gradual in nature. The videotape (which was seen by the jurors) illustrates that the police first applied a loose grip and then progressively tightened their hold until the demonstrators stood and ceased resistance. The moment the demonstrators complied, the police released the OPNs. The jury's verdict reflects the fact that the police, in fact, did all they could to *minimize* the pain inflicted.

Moreover, the dissent trivializes the risk of injury (to both officers and demonstrators) inherent in "drag and carry" removal techniques, dismissively comparing the officers' task to that of "carry[ing] their groceries to the car." [Dissent at 5723]. Even if the analogy were apt, which it is not, it assumes that police departments could, at will, "hir[e] or assign[ ] larger officers to the task." [*Id.* at 5722] Such an assumption is dubious, at best, considering the modern realities of budget cutbacks and shrinking police forces. And, even if it were possible to hire or assign officers as the dissent suggests, to do so might impede the goal of providing opportunities in law enforcement irrespective of gender. The jury's verdict reflects the fact that a major motivating factor in Chief Burgreen's adoption of the pain compliance policy was prevention of injury to *existing* officers.

> harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986). *E.g.*, *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993); *Robinson v. City of St. Charles*, 972 F.2d 974, 977 (8th Cir. 1992).

Accordingly, we now have no reason to decide whether the city's pain compliance policy authorized the use of excessive force.

IV.

Both parties request that we exercise our discretion to award attorney's fees. *See* 42 U.S.C. § 1988 (1988). We decline to do so. Because the demonstrators have not procured relief modifying the city's behavior, they are not prevailing parties. *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1992). The demonstrators' action, however, is not so meritless as to justify an award of fees to the city. *Elks Nat'l Found. v. Weber*, 942 F.2d 1480, 1485 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2995 (1992).

V.

Substantial evidence supports the jury verdict that San Diego's police officers did not use excessive force by applying pain compliance techniques to arrest the demonstrators. As a result, we affirm the district court without deciding the constitutionality of the city's pain compliance policy.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

The parties agreed to this stipulation of facts about Donna Niehouse's arrest:

> Plaintiff Donna Niehouse's arrest and seizure on April 8 included the following conduct:
>
> Mrs. Niehouse was sitting on the ground on the premises with her legs crossed;
>
> Defendant Fashing approached Mrs. Niehouse and advised her that she would be arrested for trespassing if she did not leave the premises;
>
> Mrs. Niehouse did not respond to Fashing;
>
> Defendant Fashing advised Mrs. Niehouse that she was under arrest, and immediately two other San Diego police officers placed OPN's around each of Mrs. Niehouse's wrists;
>
> Defendant Fashing said to Mrs. Niehouse, "Stand up and walk and there will be no pain at all";
>
> When Mrs. Niehouse did not move defendant Fashing ordered the police officers holding the OPN's around her wrists to "put some pain on her";
>
> As the police officers began to twist the OPN's around Mrs. Niehouse's wrists, she moved from a sitting position to a position on her knees and began screaming;
>
> The police officers continued to twist the OPN's around Mrs. Niehouse's wrists, and she continued to

> scream on her knees, and Sergeant Fashing continued to say "stand up and walk";
>
> Defendant Fashing then said, "Arrest team come on in," and, while the two police officers continued to twist the OPN's around Mrs. Niehouse's wrists, another police officer grabbed her by her hair and back of her pants, and pulled her to her feet;
>
> Mrs. Niehouse then walked from the premises in the company of the two police officers who continued to hold the OPN's around her wrists.

The use of nonchakus to hurt these non-violent, passive demonstrators was unconstitutional as a matter of law, because it was both ineffective and unnecessarily brutal.

Before explaining my reasons for dissenting, I shall point out some important things we have not decided. First, we have not decided that pain compliance techniques are constitutionally permissible as a matter of law. We have done no more than let a jury verdict stand because there was evidence on which the majority believes rational jurors could have based a verdict. The identical facts could easily have resulted in substantial damages awards which would have been upheld on the same principles which led to the affirmance in this case. Municipal officials would be mistaken to think that this decision approves the use of pain compliance on Operation Rescue demonstrators. Second, we have not decided whether plaintiffs' First Amendment rights were violated. Police Chief Burgreen testified that only the pro-life demonstrators of Operation Rescue, not other demonstrators, have been subjected to a policy of arrest by deliberate infliction of severe pain. This raises a First Amendment question. We have not answered it, because plaintiffs based their claim on the Fourth Amendment, not the First.

I dissent because the majority improperly evaluates the use of force in this case. The reasonableness of force is evaluated according to objective criteria, none of which were satisfied:

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the *severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.*
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386, 396-97 (1989) (emphasis added) (citations omitted); *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986) ("The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted."). *See also* Benjamin I. Whipple, Comment, *The Fourth Amendment and the Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 28 San

Diego L. Rev. 177 (1991). The *Graham* factors cannot be mechanically applied, but neither can they be ignored.

The demonstrators were sitting on the concrete praying and singing hymns. They resisted arrest passively, not actively, by going limp. The force used to hurt the demonstrators was not reasonable for the severity of the crimes being committed, threat to safety, or risk of flight. The police did not expect the pain to work efficiently to get the demonstrators into the vans, and in fact it did not work better than more conventional arrest techniques. The demonstrators were breaking the law, so they were properly subject to arrest, conviction and punishment, but they were also people, entitled to constitutional protection against unreasonable force. As I apply the *Graham* factors one by one, I cannot see how the force used in this case could be reasonable.

A. Split-Second Judgment.

The force used here cannot be granted the latitude *Graham* requires for split-second police judgments at the scene. The decision to use the force at issue was not made at the scene. Chief Burgreen made his policy in advance of the demonstrations, after extensive consultation and deliberation. The policy *denied* arresting officers the discretion to make on-the-scene "judgments . . . about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. Nevertheless, the force must be "judged from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. While it would be unfair to judge a split-second decision as stringently as one made with time for deliberation, the converse is not true. Police are not allowed to use force which, "judged from the perspective of a reasonable officer on the scene," *id.*, is unreasonable, because of a policy adopted without the benefit of on-the-scene knowledge. A hypothetical case makes this obvious. Suppose a police chief reasonably, in light of what was then known to him, instructed his officers with regard to a hostage taker, "if you get a clear shot, shoot

to kill — he is armed and extremely dangerous." An officer saw the suspect, and before shooting, ascertained with certainty that the suspect was no longer armed and no longer dangerous. He could not reasonably shoot the suspect dead, despite the policy decision made in advance. *Cf. Tennessee v. Garner*, 471 U.S. 1 (1985).

Garner is instructive. There, the Court overturned the result of a trial in which the defendants prevailed. The Court held that the use of deadly force to prevent the escape of an apparently unarmed felon was unreasonable. While this case does not present the unreasonable use of deadly force, it does present the use of unreasonably disproportionate force. The use of intensely painful yet ineffective force against demonstrators engaged in completely passive resistance is always unconstitutional.

B. Severity of the crime.

Chief Burgreen testified that the crimes were all misdemeanor trespassing and "a marginal resisting arrest," marginal because the city attorney was reluctant to prosecute resisting arrest cases where the arrestees did not attempt to strike the officer. The parties stipulated, and the jury was instructed, that "each plaintiff was arrested for trespass and/or failure to disperse from an unlawful assembly." The majority opinion says "many of these crimes were misdemeanors," implying that some were felonies. The implication is not supported by the record. The parties stipulated to just what the crimes were. The majority suggests a higher degree of "severity of the crime" by quotations from a concurrence and a dissent in two other cases concerning other Operation Rescue demonstrations at other times and places. That is a mistaken use of appellate judges' pronouncements. We are obligated to use the record in this case as the basis for our decision. These plaintiffs are entitled a decision based on what they and the police did here. Chief Burgreen testified, without contradiction, that all the crimes committed were misdemeanors. The

stipulated facts in this case put the crimes toward the low end of severity, so less force was reasonable than for more serious crimes. A hundred trespassers pose a more serious concern than one, and may be subject to more force within the bounds of reasonableness, but they are still only trespassers.

C. Resistance to Arrest.

The third *Graham* criterion has two parts, whether the persons arrested were "actively resisting arrest or attempting to evade arrest by flight." The demonstrators did not "actively" resist arrest. They passively resisted arrest. The stipulation of facts which the jury was instructed to apply recited that none of the plaintiffs threatened, struck, or attacked the officers. They sat. They did resist arrest, by sitting instead of walking to the van, sometimes by crossing their legs, and in one case, a woman had tied her legs together with string. But the Supreme Court's use of the adverb "actively" could only be for the purpose of distinguishing active from passive resistance. Obviously the demonstrators did not attempt to "evade arrest by flight."

D. Immediate threat.

The second *Graham* criterion, "immediacy of a threat to the safety of officers or others," affords justification for the use of force, but not the force which was used. The stipulation of facts read to the jury as part of the instructions said that the police expected, when the pain compliance policy was adopted, that the demonstrators "would likely be people who were neither dangerous nor people who would attempt to actively resist being forcibly removed from the premises." The stipulation also said that none of the plaintiffs threatened, struck or physically attacked any of the officers. The uncontradicted evidence, corroborated by videotapes of the demonstrations, established that the demonstrators just sat praying and singing hymns. Chief Burgreen described the Operation Rescue demonstrators in this case as "people who profess to

be law abiding people and are law abiding people in every other sense of the word." There was not a scintilla of evidence that any demonstrator engaged in or threatened to engage in any violence of any kind against anyone.

Most of the evidence for "immediacy of a threat to the safety of officers or others" had to do with potential back injuries to police officers from picking people up or dragging them. Chief Burgreen testified that during the 1960's and 1970's, when the police operated ambulances, the leading cause of disability retirements among police officers was back injuries from picking people up and carrying them. The incidence of back injuries fell off dramatically when the police ambulance program ended in the late 1970's. He did not think his police officers, particularly his female and small male officers, were strong enough and big enough, even in groups of four or six, to carry or drag the demonstrators to the vans without hurting their backs:

> A. We had a lot of discussions about it. We discussed the fact that — that — when I was hired, most police officers were male. Most were six feet tall, weighed 200 pounds, but for — for reasons over the years, including having some of your standards change over the years in terms of courts, we are hiring totally a different kind of officer.
>
> We hire 20 percent of our entry level police officers are women. We have no height standard. We have no weight standard. You can be a five foot tall, 100 pound woman and you can get hired as a police officer. In fact, we hire people who are five feet tall and weigh 100 pounds that are women. We hire small men.
>
> We don't have the luxury of having everybody six feet tall and 200 pounds and physically can handle themselves and carry their own weight.

. . .

> Q. You do have big, strong men on the force, don't you?
>
> A. Yes, we do.
>
> Q. Why don't you just assign those to the demonstrators?
>
> A. We actually had a little talk about that and it came down to we felt that that would be perceived as, No. 1, a goon squad, No. 2, I made it clear to the people who were planning that I wanted officers who were caring; officers who would not use too much force, if we had to use force; officers with verbal skills who would do everything they could do to talk people into coming along peacefully with us so that we wouldn't have to use any pain at all.

He testified that he had learned from someone, possibly another department, that wheelchairs were sometimes used to carry off peaceful demonstrators, but even with stretchers, gurneys or wheelchairs, he thought officers might hurt themselves. Nevertheless, he conceded that he had no experience at any time with officers lifting demonstrators or getting back injuries from lifting demonstrators.

This kind of threat to safety of officers, from their own physical limitations relative to the demands of the task, is not like an active threat by a violent person. As Chief Burgreen conceded, this particular reason to hurt people could be obviated by hiring or assigning larger officers to the task. Reasonableness does not embrace ordering all officers to hurt people because some would be too small to arrest the demonstrators without hurting them. In this particular case, large officers were in several cases arresting people of small and medium stature. One of the plaintiffs, Michaelene Jenkins, weighed

only 125 pounds. Others weighed 160-180 pounds. A person who carries a 24-pack of soda and a 24-pack of beer from the grocery store to the car carries about 40 pounds. Four officers carrying Ms. Jenkins would bear under 32 pounds each. Dragging would require less weight to be lifted than carrying. The people at the airline check-in counter, of both sexes, who move the luggage from the scale to the conveyor belt lift considerable dead weight all day. The objective measure of reasonable force cannot be based on police officers not able to carry their groceries to the car or carry their bags to the check-in counter.

The second threat to safety was the need to accomplish quick arrests. Chief Burgreen testified:

> So, anyway, what we also saw was people who were on the other side of this issue also showing up. And in several cases we had several hundreds of those people who were loud and outspoken in their beliefs in terms of, well, I guess you call it the pro-choice folks. They would have signs and they would — they would also try to get physically involved in helping people through the lines, which could lead to all sorts of problems.
>
> What we had was several types — a couple hundred people on both sides who were a very, very, volatile issue. They were very emotional and you had everything that all lined up for a nice little riot.

This threat resembles the one among the football fans in *Eberle v. City of Anaheim*, 901 F.2d 814 (9th Cir. 1990), although it lacks the beer-throwing, kicking and pushing which exacerbated the situation in that case. In the case at bar, Captain Lord testified that the police left their shields and batons behind, and did not wear helmets or face shields, because the Operation Rescue demonstrators were not violent.

E. Ineffectiveness.

The distinction between the force in this case and in *Eberle* is that in *Eberle* the force was effective but not painful. Here, it was painful yet ineffective. In *Eberle*, the police officer used an "index-finger control hold." The officer "testified that the finger-hold allowed him to direct Kiser's movement, but that he did not apply the hold with enough force to inflict pain." The arrestee, who was quickly and effectively removed from the volatile situation by means of the finger-hold, "said nothing during the trip to the security office to indicate that he was in any pain." *Eberle*, 901 F.2d at 816. In the case at bar, plaintiffs' expert witness, an experienced police officer, testified that he had been taught to use pain compliance which "causes no damage and that gets people to do what the officer wants," such as "pinching people on the fatty part of their arms which gets them to move in a hurry and which doesn't cause any lasting damage."

Sergeant Fashing, the nonchakus training officer, told the police that "most of the time they'll sit there and scream because it does in fact hurt but they won't move, so you'll have to follow up with some kind of control hold." The pain caused lasting damage, from tendon injuries to breaking a surgeon's wrist, yet did not work very well to get the demonstrators on their feet and into the van. Ms. Jenkins, the 125 pound demonstrator, testified that "I was trying to get up, but it hurt so much that I couldn't — at least for awhile I couldn't get up. . . . I was crying and I kept feeling like I was going to pass out and it was just really difficult to walk." Likewise, Donna Niehouse testified that the pain "was so bad I couldn't see, . . . I almost lost consciousness and I fell on the other officer." Harold Scofield testified that although the pain was the most severe he had felt since he broke his leg at age 10, the officers searched for a pressure point behind his ear because the pain was not getting him up. Sergeant Fashing testified that he used his hands on pressure points around the jaw, chin, nose and behind the ear on the demonstrators, because the non-

chakus were not making people get up and walk to the vans, even when used to the point of causing physical damage.

Nor were the nonchakus easy and efficient tools for the police to use. They required two officers, each of whom had to use both hands, to apply pressure to the demonstrators' wrists. Police officers testified they needed both hands to operate the nonchakus, and the nonchakus were hard to use on women because their wrists were sometimes too narrow to hold the rope in place. Each arrest, on the videotape, appeared to require two to four officers, and a fair amount of cooperation by the demonstrator to allow the nonchakus to be put around his or her wrists.

To be reasonable, force has to be designed to accomplish a legitimate objective efficiently. The objective was to make the demonstrators move from where they were seated to the vans. But the force was not used to move the demonstrators into the vans. It was used to punish them for refusing to get up and walk to the vans. It worked as punishment does, by hurting people enough so that they do something to avoid it. The nonchakus did not work like pinching the fatty part of the arm, or pulling a person by the finger, or a hammerlock, to move the demonstrators to the van. The nonchakus look like a device that would facilitate dragging, but that is not how they were used. The pressure was relaxed and they were left loose around the wrists of the demonstrators once they got up and walked. They were used as a pain inflicting device.

In this case, a more efficient pain compliance technique would have been for the officers to warn demonstrators that if they did not move voluntarily they would be burned with lighted cigarettes, and then hold the cigarettes against their skin until they complied. The pain would have been comparable, the risk of long term disability less than from tendon injury or fractures in the wrist, and the officers would have been able to keep one hand free. Probably one officer instead of two could have accomplished each arrest. I am quite sure

we would not accept the use of lighted cigarettes against the skin as reasonable force in this case. Yet the nonchakus were worse. They inflicted more serious injuries, with longer lasting consequences, without working any better to arrest people rapidly with minimum police effort. The difference may be that nonchakus at least look like dragging devices rather than torture devices. But they were not being used to drag, so that distinction does not work.

Police must sometimes use force, and inflict pain, in the performance of their duties. They need not use the least painful alternative. Not all intentional infliction of pain is torture. Use of pain is not constitutionally prohibited, but it is limited by the Fourth Amendment's reasonableness component. Whether the force works bears on its reasonableness. Because the ultimate purpose of the police was to make the demonstrators get up and walk, and the nonchakus inflicted great pain and subsequent disability without directly accomplishing this purpose, their use could not be reasonable.

Chief Burgreen testified that he expected the demonstrators to suffer abrasions, strained ligaments and strained tendons, with a possibility of broken bones. They did suffer all those injuries. Yet the police still needed to use control holds, such as manipulation of nerve pressure points, hair pulling and picking women up by their pants, to get them to the van. Determining reasonableness of force "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396. The nature and quality of the intrusion was infliction of severe pain in the course of an arrest. The countervailing governmental interests were speedy arrest and protection of the police from back injuries. Because the governmental interest does not appear to have been efficiently served by the technique, there is less to balance against the infliction of pain than if the technique had at least saved the police time and personnel.

F. The Police Problem of Passive Resistance.

Passive resistance to arrest creates serious difficulties for the police, because we are a civilized people who abhor brutality. Thoreau called civil disobedience "a counter friction to stop the machine." Henry D. Thoreau, *On the Duty of Civil Disobedience, in Walden* 229 (Signet Classics ed. 1960) (1845). This particular kind of political protest technique has a well developed philosophy. Mohandas Gandhi set out the theory of *satyagraha* in 1909, after using the practice in earlier South African demonstrations against racial discrimination:

> Passive resistance is a method of securing rights by personal suffering; it is the reverse of resistance by arms. . . . If I do not obey the law, and accept the penalty for its breach, I use soul-force. It involves sacrifice of self.
>
> Everybody admits that sacrifice of self is infinitely superior to sacrifice of others. Moreover, if this kind of force is used in a cause that is unjust, only the person using it suffers. He does not make others suffer for his mistakes.

Mohandas K. Gandhi, *Indian Home Rule, in The Ideologies of Developing Nations* 80-81 (Paul E. Sigmund, Jr. ed. 1963). Martin Luther King, Jr. built upon this philosophy to accomplish some of our finest triumphs as a nation.

The use of this philosophy presupposes a legal order. If there is no effective legal order, then there is no sacrifice of self, no martyrdom, no bearing witness. Instead, the refusal to obey the law is merely anarchy which thwarts democratic rule. The philosophy of passive resistance accepts the propriety of arrest and punishment. As Martin Luther King explained, "an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by stay-

ing in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law." Martin Luther King, Jr., *Letter From a Birmingham Jail* (1963). The demonstrators' adherence to nonviolence in this case is why the police knew they could leave behind their helmets, facemasks and batons, and that the only risk to them from the demonstrators was back strain from hauling their limp bodies away.

This passive resistance philosophy presupposes a civilized community which will not accept brutality toward the demonstrators. Had Gandhi's followers laid down on Stalin's or Hitler's train tracks, the trains would have rolled over their bodies, and the government would not have concerned itself with popular revulsion. If the rest of the country had watched the arrests at Pettus Bridge on the march to Selma and said "good – that's what those troublemakers deserve," then the Voting Rights Act of 1965 would not have passed.

Watching the videotape, and seeing small, middle aged women scream in agony as the nonchakus were twisted around their wrists made me physically ill. Yet the police still had to do such things as pulling them by the hair and back of their pants to move them to the vans. The crimes being committed looked about the same as those committed by Freedom Riders in the 1960's: trespass and failure to disperse. People will differ, as they did then, about the correctness of the demonstrators' goals, but as Gandhi explained, this philosophy of lawbreaking concedes the propriety of arrest and punishment for the illegality, and the possibility of wrong purposes. The *Graham* standard of reasonable force bars this use of pain as a law enforcement tool. The intentional infliction of pain was not a reasonable means of achieving a legitimate end.

While we value law and order, we value individual liberty and compassion so profoundly that we tolerate a good deal of disorder, and are lenient, compared to many regimes, about lesser violations of law. The intentional infliction of severe

pain during an arrest of a passively resisting demonstrator, when it is not incidental to an efficient means of making the arrest, is inconsistent with those values. Passive resistance tests our level of civilization.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 22 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MICHAEL G. FORRESTER; MICHAELENE ANN JENKINS; DONNA E. NIEHOUSE; DENA A. NIEHOUSE; NANCY H. SCOFIELD, HAROLD E. SCOFIELD,	No. 92-55137
Plaintiffs-Appellants,	D.C. No. CV-89-1051-E
v.	**ORDER**
CITY O SAN DIEGO, a municipal corporation; DONALD FASHING; D. HANNAN,	
Defendants-Appellants.	

Before: GIBSON,* HALL, and KLEINFELD, Circuit Judges.

Judges Hall and Gibson have voted to deny appellee's petition for rehearing. Judge Kleinfeld would grant the petition. Judge Hall has voted to reject the suggestion for rehearing en banc and Judge Gibson has recommended rejection. Judge Kleinfeld would grant the suggestion.

The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

---

* The Honorable Floyd R. Gibson, Senior Circuit Judge for the United States Court of Appeals, Eighth Circuit, sitting by designation.